

DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES

POLICIES AND PROCEDURES

Subject:
**RIGHT TO ACCESS AND AMEND
PROTECTED HEALTH INFORMATION
(PHI) AND PRESERVATION OF RECORDS**

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HIPAA 04-7

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Entity responsible:
Office of Legal
Counsel

1. **Purpose:**

This policy provides instruction and guidance on the preservation of current, former, and deceased service recipients' records and the right of persons to access and amend protected health information (PHI) under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Federal regulations governing the Confidentiality of Alcohol and Drug Abuse Patient Records, other relevant Federal laws, and the Tennessee Code Annotated.

2. **Definitions:**

- 2.1 **Conservator/Co-Conservator:** A person or persons appointed by the court to provide partial or full supervision, protection, and assistance of the person or property, or both, of a disabled person.
- 2.2 **Correctional Institution:** Any penal or correctional facility, jail, reformatory, detention center, work farm, halfway house, or residential community program center operated by, or under contract to, the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other persons held in lawful custody. Other persons held in lawful custody includes juvenile offenders adjudicated delinquent, aliens detained awaiting deportation, persons committed to mental institutions through the criminal justice system, witnesses, or others awaiting charges or trial.
- 2.3 **Guardian/Co-Guardian (of a Minor Child):** A person or persons appointed by the court to provide partial or full supervision, protection, and assistance of the person or property, or both, of a minor.
- 2.4 **Guardian *ad litem*:** A person meeting the qualifications set forth in Tenn. Code Ann. §34-1-107(c) [generally a lawyer licensed to practice in Tennessee] appointed by the court to represent the respondent (a minor or a person alleged to be a disabled person for whom a guardian/co-guardian or conservator/co-

conservator is being sought); and to perform the duties set forth in Tenn. Code Ann. §34-1-107(d).

- 2.5 Health Care Provider: A provider of medical or health services and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.
- 2.6 (Legal) Custodian of a Minor Child: A person, other than a parent or legal guardian, who stands in *loco parentis* to the child or a person to whom temporary legal custody of the child has been given by order of a court.
- 2.7 Legal Representative: A legal representative can be one of the following:
 - 2.7.1 The conservator of a service recipient or former service recipient;
 - 2.7.2 An attorney in fact for a service recipient or former service recipient under a power of attorney who has the right to make disclosures under the power;
 - 2.7.3 A parent of a minor child service recipient or former service recipient;
 - 2.7.4 A guardian of a minor child service recipient or former service recipient;
 - 2.7.5 A legal custodian of a minor child service recipient or former service recipient;
 - 2.7.6 A guardian *ad litem* of a service recipient or former service recipient for the purposes of the litigation in which the guardian *ad litem* serves;
 - 2.7.7 The treatment review committee for a service recipient who has been involuntarily committed;
 - 2.7.8 The executor or administrator (sometimes referred to as “personal representative”) of the estate of a deceased service recipient;
 - 2.7.9 A temporary caregiver of a service recipient under Tenn. Code Ann. §34-6-302; or
 - 2.7.10 The guardian of a service recipient or former service recipient as defined in the Uniform Veteran’s Guardianship Law at Tenn. Code Ann. §34-5-102.
 - 2.7.11 Please note that a care giver (also care provider), as defined in Tenn. Code Ann. §§ 37-5-501(1) and 71-3-501(1), is **not** included as a “legal representative”. By definition, a care giver (also care provider) is a person or persons, an entity or entities, responsible for providing for the

supervision, protection, and basic needs of a child, mostly with respect to child care agencies and children's services programs. A care giver is **not** authorized to act as a legal representative of a DMHDD service recipient.

- 2.8 Minor Child: A child is defined at Tenn. Code Ann. (TCA) §33-1-101 as a person under eighteen (18) years of age BUT SEE TCA §33-8-202 that states if a child with serious emotional disturbance or mental illness is sixteen (16) years of age or older the child has the same rights as an adult with respect to, among other things, confidential information; AND SEE TCA §33-3-104 that lists a service recipient sixteen (16) years of age and over as one of the persons authorized to consent to disclosure of confidential information.
- 2.9 Protected Health Information (PHI): Individually identifiable health information [IIHI] which is information that is a subset of health information, including demographic information collected from an individual, and created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and that identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual; and that is transmitted or maintained in electronic media, or any other form or medium. Specifically excluded from this definition is IIHI contained in education records covered by the Family Educational Rights and Privacy Act (20 USC §1232g) and IIHI contained in employment records held by a covered entity in its role as employer.
- 2.10 Psychotherapy Notes: Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes **exclude** medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.
- 2.11 Qualified Mental Health Professional (QMHP): For purpose of this policy, a person who is licensed in the state and is a psychiatrist; physician with expertise in psychiatry as determined by training, education, or experience; psychologist with health service provider designation; psychological examiner, or senior psychological examiner; licensed master's social worker with two (2) years of mental health experience or licensed clinical social worker; marital and family therapist; nurse with a master's degree in nursing who functions as a psychiatric nurse; professional counselor; or if the person is providing service to service recipients who are children, any of the above educational credentials plus mental health experience with children.

- 2.12 Service Recipient: A person who is receiving service, has applied for service, or for whom someone has applied for or proposed service because the person has a mental illness, serious emotional disturbance, or a developmental disability.

3. Policy:

3.1 Preservation of Records

- 3.1.1 All records must be preserved for a minimum of (not less than) ten (10) years after termination of service (when the service recipient was discharged from the facility or ended treatment), whichever is later.
- 3.1.2 Records of service recipients or former service recipients who ended their treatment or were discharged while still minors should be preserved for ten (10) years after the eighteenth (18th) birthday.

3.2 Access Permitted; Exceptions. Pursuant to state and federal law, upon written request, a service recipient or former service recipient sixteen (16) years of age or older; parent(s) or guardians of a service recipient or former service recipient who is a minor child; or legal representative of a service recipient or former service recipient, shall be permitted, within thirty (30) days (no later than thirty (30) days after receipt of the written request), the opportunity to inspect, review, and obtain a copy of PHI maintained in the medical record for as long as the PHI is maintained by the Department of Mental Health and Developmental Disabilities Central Office (DMHDD) or a Regional Mental Health Institute (RMHI), except to the extent that:

- 3.2.1 Access to the PHI is expressly restricted or prohibited by another statute in which case access shall be denied and such denial is not subject to review (see Subsection 3.3 of this Policy);
- 3.2.2 A qualified mental health professional (QMHP) has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to the health, life, or physical safety of the service recipient or another person in which case access shall be denied and such denial is subject to review (see Subsection 3.4 of this Policy).

3.3 Access Denied; No Review. The DMHDD/RMHI may deny a request for access, and the denial is not subject to review, under the following circumstances:

- 3.3.1 The PHI is in psychotherapy notes.
- 3.3.2 Access to the PHI is expressly restricted or prohibited by another statute as noted in Subsection 3.2.1 of this Policy.

- 3.3.3 The PHI is compiled in reasonable anticipation of, or for use in, a civil, criminal or administrative action or proceeding (i.e., lawsuits and similar proceedings).
 - 3.3.4 The DMHDD/RMHI is subject to the Clinical Laboratory Improvements Amendments of 1988 (CLIA), 42 USC §263(a) to the extent the provision of access would be prohibited by law, or the DMHDD/RMHI is exempt from CLIA pursuant to 42 CFR Part 493.3(a)(2). These provisions of the CLIA concern laboratory tests and research conducted in forensic facilities and reporting of communicable diseases.
 - 3.3.5 The PHI is requested by an inmate of a correctional institution and the disclosure would jeopardize the health, safety, security, custody or rehabilitation of the inmate or other persons inside or outside the correctional institution (i.e., other inmates; officer, employee, or other person at the correctional institution or responsible for transporting the inmate).
 - 3.3.6 The PHI is created or obtained by a covered health care provider in the course of research that includes treatment. In such cases, access to PHI may be temporarily suspended for as long as the research is in progress, provided there was informed consent to the denial of access when agreeing to participate, and with the understanding that access would be reinstated at the end of the research.
 - 3.3.7 The PHI requested is contained in records subject to the Privacy Act, 5 USC §552a, and denial of access meets the requirements of the Privacy Act. This section of the Privacy Act contains definitions of records maintained on individuals as well as conditions of disclosure and access. The HIPAA regulations regarding an individual's access to his or her private information is based on the Privacy Act guidelines.
 - 3.3.8 The PHI requested was obtained under a promise of confidentiality from someone who was not a health care provider and access would likely reveal the source of the information.
- 3.4 Access Denied; Denial Reviewable. The requester is entitled to have the denial of access reviewed by a QMHP who did not participate in the original decision to deny the access, under the following circumstances:
- 3.4.1 The QMHP who made the original decision to deny access determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to the health, life, or physical safety of the service recipient or another person;

- 3.4.2 The PHI makes reference to another person who is not a licensed health care provider and a QMHP has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to that other person; or
- 3.4.3 The access request is made by the service recipient's or former service recipient's legal representative and a QMHP has determined, in the exercise of professional judgment, that the access is reasonably likely to cause substantial harm to the service recipient, former service recipient, or another person.

3.5 Right to Request Amendment

- 3.5.1 A service recipient, former service recipient, or legal representative may request, in writing, to have the medical record amended by revision, deletion, or addition to correct the record. An explanation for the change(s) must be included with the request.
- 3.5.2 The DMHDD/RMHI may or may not accept the requested amendment. If the DMHDD/RMHI refuses the amendment, the requester may file a written statement disagreeing with the refusal. All actions must be documented and placed in the medical record.

3.6 Documentation

- 3.6.1 All actions (access request; access denials; requests to review the denial; review denials; requests to amend; amend denials; and any other such actions) must be documented and placed in the service recipient's medical record.

4. Procedure/Responsibility:

- 4.1 When request is received. When a DMHDD/RMHI employee receives a written request from a service recipient, former service recipient, or appropriate legal representative to inspect, review, copy, or amend the medical record, the employee must forward the request to the Privacy Officer/designee. If a verbal request is received, the employee must inform the individual that state law requires the request to be in writing and may provide a copy of DMHDD's Authorization to Release Information form, or direct the person requesting information to the form on the DMHDD website.
- 4.2 If requester needs assistance with authorization form or written request. If the requester requires assistance in completing an authorization form or written request, the DMHDD/RMHI employee shall provide assistance. The employee must deliver the written request to the Privacy Officer/designee.

- 4.3 Review the request. The Privacy Officer/designee must review the request and determine if there is an obligation under HIPAA, other Federal law, or state law to fulfill the request. The Privacy Officer/designee should consult with Central Office Privacy Compliance Officer or RMHI Attorney as needed to make a decision.
- 4.4 If the request is for access (review, inspect, copy) and access is granted. If the Privacy Officer/designee determines that access must be provided, the Privacy Officer/designee must, within thirty (30) days (no later than thirty (30) days) of receipt of the request, provide the PHI to the requester at a convenient time or location and in the form that is being requested. If access to the PHI cannot be provided in the form requested, the requester and DMHDD/RMHI may agree on an alternative form to provide access to the information requested. **SEE** DMHDD Policy 04-10, *Verifying the Identity and Authority of the Person Requesting Disclosure of Protected Health Information (PHI)*, **before** any disclosure is made. No cost shall be charged to review or inspect. Charges for copies shall be in accordance with either the fee schedule of the Tennessee Office of Open Records Counsel or DMHDD/RMHI policy.
- 4.5 If the request is for access (review, inspect, copy) and access is denied. If the Privacy Officer/designee denies access to the PHI, the Privacy Officer/designee must notify, in writing, the requester of the denial within thirty (30) days (no later than thirty (30) days) of receipt of the request. The writing must state:
- 4.5.1 The basis for the denial, and if applicable, a statement that the requester may have the right to have a QMHP chosen by the DMHDD/RMHI review the decision to deny access to the PHI.
 - 4.5.2 The procedure by which the requester may file a complaint with the DMHDD/RMHI; and the title, address and telephone number of the person with whom the complaint can be filed; and
 - 4.5.3 The procedure by which the requester may file a complaint with the Secretary of the U.S. Department of Health and Human Services.
- 4.6 If the access (review, inspect, copy) denial is to be reviewed. If the requester chooses to have the denial of access to PHI reviewed, the Privacy Officer/designee must appoint a QMHP, not involved in the original decision to deny access, to review the request. The requester and the DMHDD/RMHI are bound by the determination made by the reviewing QMHP.
- 4.7 If the request is to amend (revise, delete, correct) and the request to amend is accepted. If the DMHDD/RMHI accepts the requested amendment, the record must be amended within ten (10) working days of receiving the request. The requester must be informed within ten (10) days (no later than ten (10) days) of

the date of amendment. The request for amendment and a copy of the DMHDD/RMHI response must be placed in the medical record.

- 4.8 If the request is to amend (revise, delete, correct) and the request to amend is refused (denied). If the DMHDD/RMHI refuses the requested amendment, the DMHDD/RMHI must provide a written explanation to the requester within ten (10) working days (no more than ten (10) working days) of receipt of the request. The writing must state:

4.8.1 The basis for the denial (reason for refusal);

4.8.2 A statement about the requester's right to file a concise written statement of disagreement with the denial (refusal) and the process for filing such statement; and

4.8.3 The procedure, if any, for further internal review of the decision.

- 4.9 Disclosing disputed information. If any disputed information is disclosed, the disclosure must clearly note that the information is disputed and a copy of the statement of disagreement must be included with the information. A concise statement of the reasons for not making the requested amendment, if available, must also accompany the information.

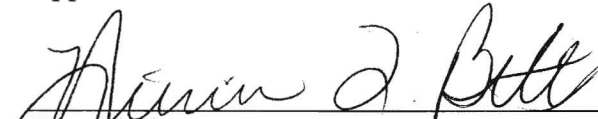
- 4.10 If the record is amended (revised, deleted, corrected). If any of the disputed information is amended, it should be clearly noted in the medical record. The date and time the change(s) were made and the name of the person making the change(s) should be noted in the chart and become part of the medical record. **The service recipient shall not personally alter the record.**

5. Other Considerations:

Authority:

Health Information Portability and Accountability Act of 1996; HIPAA Regulations 45 CFR §160.103, 45 CFR §164.501, 45 CFR §164.524, and 45 CFR §164.526; 42 CFR §493.3(a)(2); Confidentiality of Alcohol and Drug Abuse Patient Records as regulated in 42 CFR Part 2; 5 USC 552a; Tenn. Code Ann. §§ 33-1-101 and 33-1-303; Tenn. Code Ann. §§ 33-3-101, 33-3-104, 33-3-107, 33-3-112, 33-3-113 and 33-3-206; Tenn. Code Ann. §33-8-202; Tenn. Code Ann. §34-5-102; Tenn. Code Ann. §34-6-302; Tenn. Code Ann. §37-1-102(7); and Tenn. Code. Ann. §68-11-304.

Approved:


Commissioner

Date

12/10/10